MUTUALITY OF OBLIGATION: A MULTI-DIMENSIONAL DOCTRINE FOR ALL SEASONS

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I. INTRODUCTION

One of the most overworked and misleading statements invoked in the field of contract law is that mutuality of obligation is an absolute sine qua non for a binding contract. It has an appeal second only to the elusive and shadowy "meeting of the minds" standard. It is "a fundamental principle of contracts," so it is frequently and dogmatically asserted, "that both parties must be bound or neither is bound."[1] Much of the attraction surrounding this statement is semantical. The word mutuality connotes fairness, equality, and an assurance of reciprocity of right and of duty.[2] Yet in common with many abstractions, much of the symmetry and internal consistency of mutuality of obligation is lost when the phrase is applied to the concrete. It might be argued that so much vitality is lost in the attrition of applying principle to reality that the rule becomes useless—and more importantly—a source of confusion.

It is the purpose of this article to ascertain and analyze the role that mutuality of obligation has played in shaping the decision making process of Ohio courts. The cases will of course serve as the focus for the study. First, however, it is necessary to examine the origins of the term and the explanations for its existence.

II. WHY IS MUTUALITY OF OBLIGATION NECESSARY?

Mutuality of obligation (hereafter referred to simply as mutuality) is a by-product of the stresses and tensions that have been a part of the evolutionary process of the doctrine of consideration. More specifically, the term is concerned with the legal effect of

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1 F. WHITNEY, THE LAW OF CONTRACTS 109 (1958) [hereinafter cited as WHITNEY]. The origin of the rule is usually attributed to Harrison v. Cage, 5 Mod. 411 (1698).

2 It is because of these connotations that the term appears in so many forms. Corbin notes that:

> We have (1) mutuality of assent, widely asserted as a requirement, but actually often disregarded; (2) mutuality of consideration, although if only one promise is made we need to search for only one consideration; (3) mutuality of remedy, many times given as a requirement for granting the remedy of specific enforcement, but with so many exceptions that they occupy substantially the whole field; (4) mutuality of obligation.

1A A. CORBIN, CONTRACTS § 152 at 3 (1963) [hereinafter cited as CORBIN].

promises exchanged in forming a bilateral contract. There are three promissory possibilities that have produced mutuality analysis. First, the promises seemingly meet the usual requirements of valid consideration, but one promise is not legally obligatory. Second, there is no express return promise by the offeree, but one can be implied from objective manifestations.[3] Third, one of the promises might not, in a legal sense, be a promise at all, *i.e.*, the illusory promise situation.[4] As a matter of strict definition, however, the doctrine of mutuality is applicable only to the first possibility. It would unquestionably be desirable to restrict discussion to mutuality as it occurs in the "correct" or definitive sense of the term. Such an approach is not possible; the very vagueness of the doctrine and the varied case situations that have elicited its application dictate a wider style of inquiry.

Critical analysis of mutuality has been dominated by the expressions of the two giants of contract law—Samuel Williston and Arthur Corbin. Each takes a different view of the problem and, as might be expected, each has engendered case law support. Both positions will be examined as a prelude to ascertaining the posture of Ohio law.

A. *Williston*

Much of the confusion surrounding mutuality is attributable to the historical difficulty of relating the detriment-benefit standards of consideration to the bilateral contract. It was early discerned that giving legal effect to the exchange of mutual promises did not square with detriment or benefit as these terms were used to justify the enforcement of unilateral contracts.[5] Promises, being totally abstracted

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3 The classic statement on promises by implication was uttered by Cardozo while serving on the Court of Appeals of New York.

> The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed. If that is so, there is a contract.

Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 91, 118 N.E. 214 (1917).

4 There is a fourth possibility; mutuality has been

> held to involve the requirement that the undertaking of the promise relied upon as a consideration must be reasonably commensurate with, or equivalent to, the undertaking of the promise which it supports, before it can constitute a sufficient consideration—a kind of doctrine of mutuality of undertaking.

G. GRISMORE, CONTRACTS § 69 at 112 (Murray ed. 1965) [hereinafter cited as GRISMORE].

5 The essence of this test of consideration in the unilateral contract is that "what is bargained for and given in exchange for the promise shall constitute a benefit to the promisor or a detriment to the promisee." L. SIMPSON, CONTRACTS 81 (2d ed. 1965) [hereinafter cited as SIMPSON]. Detriment and benefit have been absorbed into the

from concrete obligatory commitment, simply could not be construed as constituting detriment.[6] As Sir Frederick Pollock queried, "What logical justification is there for holding mutual promises good consideration for each other?"[7]

Williston endeavored to resolve this conundrum by first positing that the offeror has the option of either requesting a promise in fact or an obligation at law. The latter possibility he discarded. "An offeror contemplating the formation of a bilateral contract says nothing of obligations, and asks only a promise in fact."[8] It is, therefore, the mutual exchange of promises in fact that Williston considered to be the point of departure for defining consideration. But the problem remains. Why is consideration status imputed into some promises in fact and denied others? The answer is that if the promise in fact represents an act or something of value that would in its own right be consideration and would (or apparently may be) forthcoming, it constitutes consideration. Or more specifically:

> Mutual promises each of which assures some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is rendered void by any rule of law other than that relating to consideration, are sufficient consideration for one another.[9]

Williston thus firmly embraced the doctrine of mutuality of obligation. *Both* promises must assure performance of something of potential value. And "a promise will be of no value unless it is

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broader "bargain" test. *See* RESTATEMENT OF CONTRACTS § 75 (1932). *See generally* R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW ch. 6 (1954).

6 Langdell argued that if the promisor promised to pay $100 for the promisee's automobile and the promisee promised to sell the automobile for $100, the consideration for the promisee's promise can be found in the fact that the promisor incurred a detriment in obligating himself to pay the $100. Langdell, *Mutual Promises as a Consideration for Each Other*, 14 HARV. L. REV. 496 (1900). This view was never accepted. "To find the required detriment that makes a consideration in the legal obligation which results from the presence of consideration is to reason in a circle." GRISMORE, *supra* note 4, at 83. Ames contended that it was the making of the promises alone that furnished consideration. Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1898).

7 28 LAW Q. REV. 101 (1912). Pollock continues: "None, it is submitted. But the contrary doctrine would only have led to cumbrous fictions, and our seventeenth-century ancestors rightly took the illogical course and said very little about it." *Id.*

8 Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503, 506 (1914) [hereinafter cited as Williston].

9 *Id.* at 527. Thus Williston went beyond Ames who theorized that it was the making of the promise, and nothing more, that furnished consideration.

binding. . . ."[10] But to Williston, mutuality was no more than a synonym for consideration. "If anything more . . . is meant by saying that mutuality is necessary for the formation of a contract, than by saying sufficient consideration is necessary for a contract, the statement must be deemed erroneous."[11]

Williston made no effort to accommodate the voidable contract. Any promise performable only at the option of the promisor, such as the promises of insane persons or infants,[12] clearly did not meet the standards of value envisioned in his definition of consideration. The infant's promise cannot support a counter-promise because it affords him the opportunity to exercise his option without suffering a detriment or giving the promisee a benefit. It is, therefore, an illusory promise. Yet promises of this character do, in the actuality of case law, support counter-promises, and one party can be bound while the other party has complete freedom as to whether he will be bound. The obvious solution to this clash of theory with reality, and the solution adopted by Williston, is to classify the voidable contract "as an exception to the principles of consideration."[13]

The merger of consideration and mutuality, with the concommitant exemption for voidable contracts, has not been universally absorbed into contract law by either the cases or by commentators. Ballantine argued that Williston's approach was defective because it overlooked the distinction between the voidable promise situation, such as incapacity, fraud, or statute of frauds, and the case where one of the parties promises nothing in return. In the latter situation there is obviously no consideration and hence no mutuality. This is not true, so Ballantine contended, where a voidable promise is concerned.[14] By defining consideration as "something of possible value given or [and this is where Ballantine differed from Williston]

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10 *Id.* at 525.

11 *Id.*

12 Oliphant noted seven "exceptions" to mutuality.

> Among such cases are those in which one party: (1) is an infant, (2) is insane, (3) has been guilty of fraud, (4) of duress, (5) of illegality, (6) is a corporation acting *ultra vires*, (7) has not complied with the Statute of Frauds.

Oliphant, *Mutuality of Obligation in Bilateral Contracts*, 25 COLUM. L. REV. 705, 706 (1925).

13 Williston, *supra* note 8, at 528.

14 In a voidable promise transaction we have all of the affirmative elements of a valid contract, but the obligation of one of the parties is affected or taken away owing to the presence of some defense or negative element which does not affect the obligation of the other.

Ballantine, *Mutuality and Consideration*, 28 HARV. L. REV. 121, 131 (1914).

undertaken to be given in return for something promised"[15] he was able to fit voidable promises into mutuality. Thus, in an exchange of promises between adult and infant, both parties have committed themselves to mutual undertakings and this commitment is not erased by the fact that the law, for reasons of policy, makes available an absolute defense to the infant. Consideration is present "in the reciprocity or mutuality of the respective undertakings. . . ."[16]

In terms of broad perspective, there is little difference between Williston and Ballantine. Both related mutuality to consideration. To Williston, a voidable promise, lacking what he characterized as "value," was in effect illusory and consequently could not support a counter-promise. This being the case, a lack of consideration (and mutuality) could be expected to prevent the existence of an enforceable contract. But this did not happen. Promises of infants, insane persons, promises involving fraud or those promises within the statute of frauds do, as a matter of fact, support counter-promises. These promises, according to Williston, are outright exceptions to rules of consideration. Ballantine, on the other hand, concluded that voidable promises did meet what he considered to be the definitive boundaries of consideration. Consideration resides in the reciprocity of engagement or undertaking and the fact that the law allows one party an absolute defense cannot erase this form of mutuality.

B. *Corbin*

Corbin's approach to consideration and mutuality is the antithesis of Williston's. Where Williston endeavors to maintain a sense of symmetry and unity between abstract principles and case law, Corbin, ever the pragmatist, looks directly to "the ever-growing multitude of transactions of men, the flood of decisions by innumerable judges, the evolution of our social practices and mores . . ."[17] for guidance. Using these sources as a frame of reference, Corbin concludes that mutuality simply does not square with the reality of case law. Courts have recognized and supported too many contractual relationships where both parties are not reciprocally bound. He does not, however, deny that the statement of the rule makes frequent appearances in the working vernacular of jurists, "made perhaps with nothing but 'illusory' promises in mind."[18]

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15 *Id.* at 132.

16 *Id.* at 131.

17 1 CORBIN, *supra* note 2, § 142, at 613.

18 *Id.* at § 146, at 635.

Corbin also explains the persistence of the doctrine as being attributable to the failure to appreciate the distinction between mutuality and consideration. For example, where courts are unable to discover a counter-promise by implication they frequently conclude that a lack of mutuality prevents creation of a binding contract. Noting that in such a case even a single obligation is lacking, Corbin asserts:

> It may be a satisfactory reason for holding the defendant's promise unenforceable that there was no consideration; merely saying that there was no mutuality is wholly unsatisfactory.[19]

As the law sanctioned enforcement of transactions in an increasing number of situations in which mutuality of obligation was obviously absent, so Corbin reasoned, the term lost any relevance that it might have once possessed. Thus to consider mutuality as a necessary component of consideration or to give it status as an independent principle of law is to ignore the dominant and better reasoning of contemporary courts. Simply stated, "Courts now often say correctly that it is consideration that is necessary, not mutuality of obligation."[20]

The idea that mutuality is superfluous nomenclature totally lacking in relevant content has been echoed by Professor Grismore. His recommendation is every bit as direct and succinct as Corbin's: mutuality "has outlived any possible period of usefulness."[21] Thus, he continues, "the time has come when it should be frankly disavowed."[22] But, while agreeing in conclusion with Corbin, Grismore's reasoning was definitely his own. First, he reasoned that mutuality's obsolescence can be explained by its causative forces. Mutuality is a relic of pre-constructive condition decisions. When one promisor to a bilateral contract could demand performance without a reciprocal performance on his part, mutuality of obligation was a very necessary form of protection. However, the appearance of the doctrine of constructive conditions, which protected both parties as to their respective rights of performance, rendered the concept of mutuality

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19 1A CORBIN § 152, at 10-11.

20 *Id.* at 5. Corbin had at one time been hesitant about abandoning mutuality.

> The present writer is not yet ready to abandon . . . [mutuality] altogether; but he is thoroughly convinced that its correctness as a rule of law cannot be established by any mere deductive process based upon some more ancient and general rule of law.

Corbin, *Non-Binding Promises as Consideration*, 26 COLUM. L. REV. 550 (1926).

21 GRISMORE, *supra* note 4, § 69 at 116.

22 *Id.*

barren of practical value. Consequently there is no longer any justification for dogmatically holding that any non-enforceable promise constitutes insufficient consideration. It logically follows then, and this is the second point in Grismore's analysis, that some non-binding promises—the infant's promise for example—can have value[23] and can constitute consideration. The critical issue, therefore, is one of the presence of consideration—not mutuality.[24]

As the above survey indicates, mutuality presents unique problems of analysis. When legal rules precipitate controversy, it is usually over the application of an established and well defined rule to a formerly untouched fact situation. This is not the case where mutuality is at issue. Controversy begins with the definition to be assigned mutuality and, assuming, but not conceding, resolution of this hurdle, continues on to the conflict over the degree of recognition to be given the concept in contract analysis. Considering this background it is easy to understand why Ohio courts have not had an easy time with mutuality.

III. Mutuality and Unilateral Contracts in the Ohio Courts

The embroglio that can be generated by an automatic and mechanical invocation of mutuality is graphically reflected by the endeavors of Ohio courts to use the doctrine to justify the creation of unilateral contracts. As a matter of correct definition, mutuality of obligation and the unilateral contract are mutually exclusive.[25] When the unilateral offer is made, obviously no reciprocal obligation exists on the offeree's part. Once the requested performance is ren-

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23 If the person promising has undertaken to set some objective limits to his future freedom of action, there is ground for saying that his promise has value, even though that promise is not legally enforceable. This is in fact the test of value which the law seems to adopt for this purpose . . . .

Id. at 115.

24 For additional discussion on mutuality *see* Simpson, *supra* note 5, § 55 at 91-95; Whitney, *supra* note 1, § 49 at 109-15. Both Simpson and Whitney equate consideration with mutuality; neither advocates abandonment of the doctrine. The view of the Restatement of Contracts is evasive: "The statement often made that unless both parties are bound neither is bound is quite erroneous, *as a universal statement.*" (emphasis supplied) Restatement of Contracts § 12, Comment b (1932).

25 As a matter of fact, reliance on mutuality of obligation almost resulted in the demise of the unilateral contract. "So appealing has been . . . [mutuality] that the term 'unilateral contracts,' seeming to be its opposite, almost came to mean a one-sided unenforceable promise. A valid contract had to be 'mutual'; if not mutual, it was 'unilateral' and void." 1A Corbin, *supra* note 2, § 152 at 3.

dered by the offeree, only one obligation remains—the obligation of the offerer to render his performance. Thus, as Professor Whitney points out, "In a unilateral contract there is never a moment of time when both parties are bound to do something."[26] These definitional restrictions have not, however, prevented Ohio courts from reading mutuality into unilateral contract analysis. The following remark, from a *per curiam* Ohio Supreme Court decision is typical: "Standing unaccepted, the offer [for a unilateral contract] was but a unilateral promise, lacking in consideration and in mutuality. . . ."[27]

There are two possible explanations for this line of reasoning. It will be remembered that Williston theorized that consideration sufficient to support a counter-promise existed if what was promised would, when performed, constitute consideration in its own right.[28] A present promise hence was viewed in terms of the effects and quality of future performance. Ohio courts invoke an "after the fact" version of this analysis. The doing of a requested act supplies the requisite consideration and in doing so corporealizes an unmade reciprocal promise by the offeree. The courts, in weaving mutuality into the reality of the unilateral contract, implicitly assume that the performance relates back to an unspoken promise that, if it had been uttered, would have constituted sufficient value (consideration), and thereby form a basis for mutuality of obligation.

In relating performance back to a hypothetical promise for the sake of mutuality, the courts have on several occasions concluded that no promise can be implied. Hence no mutuality. For example, one Adam Coy promised to construct or pay for the construction of a turnpike in exchange for shares of stock in the turnpike company and a commitment that the road would cross his land in a designated area.[29] The plaintiffs completed the turnpike up to Mr. Coy's farm and then tendered the stock, which he refused to accept. The turnpike company argued that the mutuality defense was avoided because of their performance in tendering the shares and because they had built the road up to the boundaries of the defendant's land. This the court refused to accept. Instead they en-

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26 WHITNEY, *supra* note 1, § 49 at 110.

27 Bretz v. Union Cent. Life Ins. Co., 134 Ohio St. 171, 175, 16 N.E.2d 272, 274 (1938).

28 The origin of this approach to consideration is Lord Holt's dictum that ". . . where the doing a thing will be a good consideration, a promise to do that thing will be so too . . ." Thorp v. Thorp, 12 Mod. 455, 459, 88 Eng. Rep. 1448, 1450 (K.B. 1702). *See generally* Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 816-18 (1941).

29 Dayton, Watervleit Valley and Xenia Turnpike Co. v. Coy, 13 Ohio St. 84 (1861).

deavored to ascertain whether performance by the turnpike company suggested a promise on their part and if this promise, implicit or express, could be said to have been mutual and concurrent with the defendant's promise. Inquiry into the record revealed that at the instant Coy made his promise, there was no reciprocal commitment by the plaintiff. And the subsequent performance did not indicate that such a promise on the part of the plaintiff could be implied.[30] There was, therefore, a lack of mutuality.

Twenty years later the Ohio Supreme Court engaged in a similar search in *Andrews v. Campbell.*[31] One year after the defendant issued a promissory note he allegedly agreed to pay 10% interest on the note if the plaintiff's intestate would extend the time of payment. The time of payment was, in fact, extended. On the basis of this, the plaintiff argued that "the contract became . . . an executed one . . ."[32] which had the effect of erasing lack of mutuality and making the defendant's promise to pay the 10% interest rate binding. The court, as in the *Coy* case, acknowledged the fact of a form of performance—time was extended—but they then concluded that his performance could not be related to, nor did it engender, a supporting promise. ". . . [I]t does not appear that the act of giving time by White [the plaintiff's intestate] *was in execution* of any contract with Campbell, or of any terms or conditions, express or implied, as the consideration for his promise."[33]

The second explanation for the proclivity of Ohio courts to weave mutuality into the unilateral contract reflects the not infrequent situation where there is an "exchange" of promises but one promise does not constitute sufficient consideration. However, subsequent performance of this non-binding promise repairs the defect and converts what would have been a "void" bilateral contract into

30 Without something more than the act of locating the road across the farm of the defendant, it would be impossible for the defendant to show that it constituted an agreement on the part of the turnpike company. Had the stock on the completion of the road advanced to above its par value, and the defendant been desirous to procure stock equal to the amount of the estimate for building the part of the road described in the instrument, he certainly could not sustain his claim by showing the written instrument and the fact of the location of the road. He would be bound to show assent in some other way, and other evidence of assent being requisite to bind the company, it is also requisite to bind the defendant.

Id. at 94-95.

31 36 Ohio St. 361 (1881).

32 *Id.* at 368.

33 *Id.* at 369.

an enforceable unilateral contract. Ohio courts, perhaps in a zeal to justify the unilateral contract, have a tendency to cloak their explanations with mutuality dialogue.

Perhaps the most influential case on this point is *Himrod Furnace Co. v. Cleveland and Mahoning R.R. Co.*[34] The defendant railroad, at the plaintiff's suggestion, agreed to transport all of the pig iron manufactured by furnaces that were to be erected by the plaintiff. The offer was thus contingent upon the erection of the furnaces. Using this fact as a basis, the Railroad argued that since the plaintiff was under no obligation to fulfill the terms of his promise (*i.e.* erection of the furnaces) their own promise "was naked —without consideration,"[35] resulting in a lack of mutuality. The court acknowledged that there was no mutuality prior to the erection of the furnaces. But immediately upon performance by the plaintiff, mutuality descended over the transaction. In effect mutuality was defined as executed consideration. Hence even though the plaintiff was not bound originally, his giving executed consideration supplied mutuality.[36]

There is no question as to the validity of the unilateral contract in *Himrod.* But criticism can be directed towards the injection of mutuality into the analysis. Admittedly, an ostensible compatibility between the doctrine of mutuality and the unilateral contract is maintained. But the price for symmetry, and a specious symmetry at that, is too high. As Corbin observes: "While the result reached in these cases is sound, such a method of rationalizing it merely perpetuates confusion of thought."[37]

In Ohio, the confusion of thought engendered by *Himrod* was to have a deleterious effect on decisional reasoning twenty years later in *Herrick v. Wardwell.*[38] The Cleveland Dairy and Transportation Company entered into contracts with local milk producers which

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34 22 Ohio St. 451 (1872).

35 *Id.* at 457.

36 It matters not, in our judgment, whether Kimball and associates were or were not bound to defendant to erect a furnace according to the condition of the agreement; for having done so at the request of defendant, and relying on the faith of its promise, they have a right to insist upon performance on its part. Nor does it matter whether Kimball and associates were bound to deliver freight to the defendant, as they have executed the consideration for defendant's promise to carry freights for them at a given rate for a specified time when requested.

Id. at 460.

37 1A CORBIN § 152 at 5.

38 58 Ohio St. 294, 50 N.E. 903 (1898).

contained the following terms: the milk producer agreed to sell to the Company "all the milk produced by him, and amounting to 20 gallons or more per day for a period of one year. . . ."[39] The Company agreed to pay a specified sum of money per gallon. Milk was delivered until an assignment for the benefit of the Company's creditors was made; at that time, nearly thirteen hundred dollars was owed the milk producers for milk already delivered.

The defendant Cleveland Dairy's defense was premised on the argument that the milk producers were not bound to produce and deliver *any* milk, and if the producers were not bound, neither was the defendant. On a superficial level the defendant's argument was correct; the milk producers could avoid any obligation to produce. Yet closer analysis of the promise indicates that it will support a counterpromise. The agreements were output contracts: the milk producers were committed to selling their total production ("amounting to 20 gallons or more per day") to the Dairy Company. And it is universally recognized that in the exchange of such promises, sufficient consideration is present to make the contract binding. As Corbin reasons: even though

> the promisor retains the privilege of closing down the works and of producing and delivering nothing, he has given a sufficient consideration in promising to sell his entire output, whatever it may be, to the promisee and none to others.[40]

The Ohio Supreme Court accepted the basic thrust of the defendant's argument. At the time the agreement was entered into, there was, so they concluded, no consideration and no mutuality. But, the court reasoned, this deficiency was cured by performance which resulted in the formation of a unilateral contract with mutuality of obligation. ". . .[W]hen milk was produced and shipped, the obligation of the corporation to pay for it was binding, *and the contract between the parties was then both definite and mutual*" (emphasis supplied).[41]

The path followed by the court in reaching what is clearly a correct conclusion invites criticism. In endeavoring to meet the defendant's argument head-on, the court needlessly embarked on a search for mutuality. And once the search was undertaken, it was necessary to restructure the entire transaction. The existence of an enforceable bilateral output contract was disregarded because it was

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39 *Id.* at 296, 50 N.E. at 903.

40 1A CORBIN § 158 at 56-57.

41 58 Ohio St. at 308, 50 N.E. at 905.

thought that mutuality was absent. Then, to satisfy an assumed mutuality requirement, it was necessary to focus on the plaintiff's completed performance, which supplied the basis for the conclusion that a unilateral contract had been created; a unilateral contract with mutuality. Unfortunately, as noted above, mutuality of obligation and the unilateral contract are not compatible.[42]

IV. Mutuality and Consideration as Analyzed by the Ohio Courts

With one notable exception,[43] which will be discussed later, Ohio courts have embraced Williston's view that mutuality and consideration are synonymous. This view is firmly entrenched in contract stare decisis—dating at least as far back as the 1861 *Coy* decision. In structuring justification for endeavoring to ascertain the existence of an implied promise the court laid down a perspective of interchangeability that persists today. "Every contract consists of a request on one side, and an assent on the other."[44] And, to the court, "These are the terms of mutuality: if either are absent, there is no contract."[45]

Treating consideration and mutuality as synonymous should have resulted in the gradual dissipation of discussions concerning mutuality. The pressures of developing consistent principles of consideration would presumably efface a concept so peripheral as mutuality. This has not occurred. Where, as in *Mutual Home & Savings Ass'n v. Welker*,[46] the court could easily have confined its

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42 For other cases in which mutuality has been invoked as an element of the unilateral contract *see:* Brown v. Fowler, 65 Ohio St. 507, 63 N.E. 76 (1902); Hassenzahl v. Bevins, 2 Ohio C.C.R. (n.s.) 496 (Ct. of App. 1902); Macy Corp. v. Ramey, 75 Ohio L. Abs. 334 (C.P. 1957). Mutuality has even been injected into the unilateral contract on an estoppel theory. Where the plaintiff extended a continuing offer under which the defendant could accept by performing specified acts, it was held that:

> Where a contract is invalid for want of mutuality, and where the party asserting the invalidity has received benefits thereunder . . . , such party will be estopped from refusing performance on the ground that said contract was not originally binding on the other party who has performed.

Penna. R.R. Co. v. N.O.T. & L. Co., 4 Ohio L. Abs. 702 (Ct. App. 1926).

43 Fuchs v. United Motor Stage Co., 135 Ohio St. 509, 21 N.E.2d 669 (1939), *noted in* 13 U. Cin. L. Rev. 586 (1939). *See also* Austin, *Mutuality of Remedy in Ohio: A Journey from Abstraction to Particularism*, 28 Ohio St. L.J. 629 at 638-41 (1967) [hereinafter cited as Austin].

44 Dayton, Watervliet Valley and Xenia Turnpike Co. v. Coy, 13 Ohio St. 84, 92 (1861) (quoting Jackson v. Galloway, 5 Bing N.C. 75).

45 *Id.* (quoting Smith on Contracts 88, note).

46 35 Ohio L. Abs. 566, 42 N.E.2d 167 (Ct. of App. 1941).

analysis to the sufficiency and to the existence of consideration, mutuality was introduced as the clinching argument. The defendant issued a fifty-three hundred dollar promissory note, accompanied by a mortgage, to the plaintiff Savings Association. Subsequently the defendant agreed to pay off the obligation by purchasing stock in the plaintiff association. The stock was to be credited against the note at the face value of the shares. Because the market value of the stock was considerably below its face value the defendant endeavored to erase the obligation with tender of two thousand dollars which would have been sufficient to buy up enough of the depreciated stock to settle the account.

The issue was crystal clear; all the court had to do was to focus its inquiry on the existence of consideration. Moreover, the perimeter of inquiry was not expansive nor burdensome. The question before the court was did the defendant debtor's promise constitute legal detriment to him or confer a legal benefit on the creditor? Stated differently, where a liquidated debt is involved, does a promise to pay a lesser sum constitute consideration? After concluding, as the court did, that the defendant's promise did not measure up to the standards imposed by the incrustations of prior decisions, inquiry should have ended. Analysis was, however, prolonged so as to give the decision the added color of mutuality. It was during this process of endeavoring to create what was assumed to be internal harmony of reasoning that the futility of maintaining consideration and mutuality as interchangeable concepts became apparent. Words intended to be synonymous were separated in application into parallel rules. In the *Mutual* case an equation appeared: consideration *plus* mutuality equals enforceable contract. "If there was no consideration for the contract there could be no mutuality, nor could such contract be enforced."[47] This, of course, goes beyond Williston's view of the interchangeability of consideration and mutuality.

V. The Relevancy of Mutuality of Obligation to "Illusory" Promises

The elasticity and range of mutuality, plus its confusion generative capacity, are conspicuous where the existence of an illusory promise is at issue. When a promisor makes a promise in which the performance is completely within his control and at his option it is called "illusory." As far as contract doctrine is concerned, an il-

47 *Id.* at 569, 42 N.E.2d at 170. *See also* Doan v. Rogan, 79 Ohio St. 372, 87 N.E. 263 (1909).

lusory promise is a term descriptive of what is, in effect, no promise.[48] This means that a discussion of consideration and certainly of mutuality is irrelevant; the core of the problem is the level of commitment contained in the promise under scrutiny. The determination of whether a promise is, or is not, illusory can be quite difficult, calling into play the esoterica of contract dialectic.[49] The complexity of the problem is magnified in those situations where the promisor bargains for an illusory promise and gets it, as in *Evans v. Peck-Hammond Co.*[50]

There was little doubt about the defendant's request for a counter-illusory promise. "We propose to make for you any and all gray iron castings which you may order of us. . . ."[51] The contract was "to be in force until January 1, 1901, with privilege of renewal year by year with a readjustment of price. . . ."[52] The defendant thus agreed to manufacture castings *if* the plaintiff decided to place an order. The plaintiff in his return "promise" made no commitment—he had the option of either making an order or not, but in any case, the decision was his alone to make. Although the record is not clear on this point, the plaintiff apparently did submit orders during the first year and then filed suit when the defendant refused to continue service.

The defendant's offer for an illusory promise and the plaintiff's acknowledgment of the offer could not constitute, in terms of consideration, the basis for an enforceable bilateral contract. When, however, the plaintiff "performed" by actually ordering and promising to pay for the manufacture of a specific number of castings, the "illusion" was corporealized into a bilateral contract. A standing offer to sell had been accepted; the exchange of promises was completed.[53] But at the time of renewal, after one year of performance,

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48 An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise, although often called an illusory promise.

RESTATEMENT OF CONTRACTS § 2, comment b (1932).

49 *See* Patterson, *"Illusory" Promises and Promisors' Options*, SELECTED READINGS ON THE LAW OF CONTRACTS 401 (1931); Corbin, *The Effect of Options on Consideration*, 34 YALE L.J. 571 (1925).

50 15 Ohio C. Dec. 161 (1903).

51 *Id.*

52 *Id.*

53 Corbin analyzes this type of situation as follows:

Where a dealer offers to supply on stated terms such quantities of goods as the offeree may choose to order during the next year and the offeree expresses

the offer was obviously withdrawn by the defendant. Hence, the suit concerned an offer for an illusory promise that had been revoked before the offeree had an opportunity to accept and create a bilateral contract. Neither consideration nor mutuality was at issue.

Apparently both counsel overlooked the crucial issue. To defendant's counsel an offer was made for a bilateral contract to which the plaintiff failed to respond with a counter-promise. Consequently the mutuality doctrine that "a promise is a good consideration for a promise only where there is a perfect mutuality of engagements so that each party may enforce the contract against the other,"[54] exonerated him from liability. Agreeing that a mutuality obstacle did exist, the plaintiff endeavored to hurdle it with executed consideration in the form of the furnishing of wood and iron for casting patterns along with an experienced superintendent.

The court responded to counsels' off-center lack of consideration arguments; they concluded that in fact the plaintiff made no promise to perform, and that providing a superintendent and patterns was "but an incident, a working detail . . . of the contract"[55] and hence could not be construed as executed consideration. In addition to the fact that the offer revocation issue was generally overlooked, the decision can be criticized on two other counts: first, the use of mutuality as an all embracive term to be invoked whenever a consideration argument is raised was perpetuated. It was another instance of mutuality being employed as a device to encompass whatever might escape other arguments. Secondly, another fact situation was drawn into the mold of the mutuality doctrine, thereby expanding the perimeter of potential application.[56] Neither point can be said to be desirable.

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assent thereto, there is no contract because the offeree has made no promise and has given no other consideration for the dealer's promise. Nevertheless, the transaction is operative as a standing offer to sell; and if the offeree, before any revocation, sends in an order for a definite amount of goods, a bilateral contract for such goods is effected. However 'illusory' his former expression of assent may be as a promise, his present order is an enforceable promise to buy and pay for the goods ordered, in accordance with the dealer's communicated terms.

1 CORBIN, *supra* note 2, § 145 at 633.

54 15 Ohio C. Dec. at 164.

55 *Id.* at 165.

56 The court did, however, note that: "Before the first year was out the attitude of both parties was clearly defined on the subject of renewal, one expressly claiming the right to renew, and the other with equal explicitness repudiating such right . . . ." *Id.* at 166.

VI. Mutuality of Obligation and the Option: An Exception?

It has been noted that some transactions simply do not fit into the strictures of the mutuality definition.[57] The option, which to Williston was an outright exception, is a classic example. The following case is typical: the defendants, for one dollar consideration, gave the Wiedemann Brewing Company "an option of ten days from this date for the leasing of the building owned by us. . . ."[58] The right and power, as a matter of law, to accept the lease was thus conveyed to Wiedemann. On the other hand, the defendants could not have invoked jural machinery to force Wiedemann to accept the lease. One party was bound, the other retained freedom of power to make a commitment.

At cursory glance, this form of option has illusory promise overtones. While the defendants are committed to a definite course of action, the Wiedemann Company has unlimited freedom of decision as to whether they will take possession of the premises. The difference, however, between the option contract and the illusory promise is that in the former situation the promisee, who in this case is Wiedemann, pays consideration for the right to exercise freedom of choice.[59]

Confronted with a clash of mutuality doctrine with the option arrangement, the Ohio Supreme Court equivocated. Any possible lack of mutuality was, so the court reasoned, cured when Wiedemann exercised its rights to the premises. "[T]he acceptance by the

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[57] *See* note 12 *supra.*

[58] George Wiedemann Brewing Co. v. Maxwell, 78 Ohio St. 54, 55, 84 N.E. 595, 596 (1908).

[59] Therefore, one who has given a consideration for a real promise can enforce that promise, even though he may himself have an unlimited option. His legal right is not affected by the fact that he has made no promise at all or has made some illusory promise. Thus, where *A* promises to convey land to *B* for $5,000 at any time within 30 days, and in return *B* pays *A* $100, *A*'s promise to *B* is binding even though *B* has made no promise at all. This is because *B* has actually paid $100, amply sufficient as a consideration. There is nothing illusory about *A*'s promise, although it is conditional on payment of $5,000 within 30 days. *A*'s legal duty is not made dependent on his own will, wish or desire, but upon the act of payment by *B*. *A* has no option whatever. *B*, on the other hand, has an unlimited freedom of choice, the option between paying $5,000 and not paying it. *B*'s unlimited option does not invalidate *A*'s promise to *B*. This is true of every unilateral contract, whether the promise of which it consists is conditional or unconditional.

Corbin, *The Effect of Options on Consideration*, 34 YALE L.J. 571, 576 (1925).

promisee within the time prescribed supplied lack of mutuality, *if any before existed,* and was sufficient to constitute a binding obligation" (emphasis supplied).[60] The flaw in this approach is that as soon as the promisee, Wiedemann, performed, the only obligation remaining would be that of the promisors; they would be obligated to relinquish the premises.

Contouring mutuality into executed performance and thereby creating "mutuality of obligation" came into Ohio case law through the unilateral contract. The same criticism that was directed toward the merger of mutuality with the unilateral contract also applies to the option; at no time is there an exact instant when the obligations can be said to be mutual. There is, however, one substantial difference between the two transactions. The right to exercise the option is cemented by consideration. This distinction has had an impact on subsequent Ohio decisions, resulting in the option being expressly carved out as an exception to the doctrine of mutuality. "Under such contracts," the Ohio Supreme Court said in 1939, "consideration is essential, but mutuality of obligation is not."[61]

VII. The Erosion of a Doctrine: Requirements Contracts

Perhaps the most delineative example of the manner in which the energy of the doctrine of mutuality has been diluted into near obsolescence is the contemporary interpretation given the requirements contract. The broad definition of the arrangement is simple: the promisor agrees to purchase all of his requirements over a specified period of time from the promisee. It is a commercial relationship that provides significant economic advantages to both parties. To the seller, such contracts "may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and . . . offer the possibility of a predictable market."[62] The buyer is assured a source of supply and protection against price increases, both of which allow him to engage in long run cost planning.

The most serious hurdle that the requirements contract had to overcome in order to achieve recognition by the courts was mutuality

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60 78 Ohio St. at 63, 84 N.E. at 597. The syllabus reads as follows: "Written agreements known as options are not necessarily void for lack of mutuality, and where accepted within the time specified may become valid and enforceable contracts." *Id.* at 54, 84 N.E. at 595.

61 Fuchs v. United Motor Stage Co., 135 Ohio St. 509, 519, 21 N.E.2d 669, 674 (1939).

62 Standard Oil Co. v. United States, 337 U.S. 293, 306-7 (1949).

of obligation.[63] Two factors seemed to have generated concern: one, the promisor was not obliged to have any requirements. He could, for example, go out of business or he might shift his business to other product lines. Secondly, if the promisor did go out of business his duties and obligations were, under the terms of the contract, at an end. On the other hand, the promisee did not, so it was often reasoned, enjoy equal freedom. He had to always be ready to meet the promisor's needs. By analyzing the transaction in these terms it is not surprising that courts frequently reached the conclusion that the promisor's commitment was illusory and that the transaction lacked mutuality.

As soon as the inquiry focused on consideration, the above line of reasoning receded and, in some instances, was discarded. Requirements contracts are today universally upheld. Because by his promise he circumscribes his decisional freedom, the buyer has furnished sufficient consideration to support a counterpromise. There is, in reality, no illusion in the purchaser's promise since it "contains one very definite element that specifically limits the promisor's future liberty of action; he definitely promises that he will buy of no one else."[64]

That mutuality of obligation does not pose an insurmountable obstacle to the enforcement of requirements contracts has been a part of Ohio stare decisis since *Fuchs v. United Motor Stage Co.*[65] was decided in 1939. The defendant, who operated a fleet of buses, promised to purchase all of its gas, oil, and grease requirements from Fuchs at specified prices. The plaintiff, of course, agreed to meet these terms and, in addition, at the inception of the arrangement he purchased seventy-five hundred dollars worth of stock in the defendant's business. The contract was to continue so long as the plaintiff retained the stock.

The essentials of an enforceable requirements contract were discernible and fixed. The length of the arrangement was keyed to the possession of stock, while quantity of supplies was fixed by Motor Stage's good faith needs predicated on prior experience. The Ohio Supreme Court's ratiocination was, nevertheless, anything but smooth. Unquestionably much of the unevenness can be attributed to the crucial mutuality of remedy issue.[66] Developing new doctrine,

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63 *See* Havighurst & Berman, *Requirement and Output Contracts*, 27 ILL. L. REV. 1, 3-4 (1932).

64 1A CORBIN, *supra* note 2, § 156 at 33.

65 135 Ohio St. 509, 21 N.E.2d 669 (1939).

66 On occasion Ohio courts have merged the totally different concepts of mutuality

as the court did in the mutuality of remedy area, is never a smooth or easy process.[67] It is also true, however, that an over reaction to mutuality of obligation did not ease the burden of this analysis. For example, it was acknowledged that a requirements contract is not lacking in mutuality of obligation. Two sentences later consideration was separated from mutuality: "so long as there is consideration for the obligation of the defendant, it is not essential that there be mutuality of obligation. . . ."[68]

The unique feature of the case, and undoubtedly the cause of the separation of mutuality from consideration, was that it was the promise of the promisee that was alleged to lack the substance necessary to generate mutuality. As noted, it is usually argued that it is the promisor-buyer who has made an illusory commitment. Fuchs' right to sell the stock at will and thus terminate his obligation to supply gas and oil to Motor Stage left the contract indefinite, so it was argued, as to time. More importantly, the choice of performing was completely within Fuchs' discretion. To the court the arrangement was similar to an offer for a unilateral contract—the right to revoke exists until performance consumates the deal. "Ordinarily [reasoned the court in continuing to sustain the reading of mutuality into the unilateral contract] such a contract would not be enforceable . . . for lack of mutuality."[69] The transaction was nevertheless held to be enforceable because of what the court labeled "independent or collateral" consideration—the seventy-five hundred dollars paid by the plaintiff for Motor Stage's stock. To explain away the need for mutuality an option analogy was invoked. "Under such contracts, consideration is essential, but mutuality of obligation is not."[70]

It was a complicated and labored reasoning process that the court followed. And it could have been avoided had not mutuality of obligation been considered sufficiently relevant to merit discussion. What was clearly a requirements contract by every term of the definition was cloaked with the accoutrements of an option, precipitating reliance on "independent" consideration.[71] It would have

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of remedy and mutuality of obligation. *See e.g.*, Richards v. Doyle, 36 Ohio St. 37 (1880); State v. Baum's Heirs, 6 Ohio 383 (1834); Wright v. Rand, 6 Ohio L. Abs. 741 (Ct. of App. 1928).

67 *See* Austin, *supra* note 43.

68 135 Ohio St. at 515, 21 N.E.2d at 673.

69 *Id.* at 519, 21 N.E.2d at 674.

70 *Id.*

71 Reliance on "independent consideration" is traceable to the decision by the court of appeals (Muskingum County). The court conceded that requirements contracts

been easier and far more logical to recognize that Fuchs' promise was not illusory and that his freedom of action was restricted in two ways. First, he had to meet the defendant's gas, oil and grease demands. Secondly, if Fuchs wanted to get from under the burdens of the arrangement, he would have had to give up his rights of ownership in the defendant's business. Hence mutuality was, in fact, present in the transaction. "[E]ach party is under a legal duty to the other; each has made a promise and each is an obligor."[72] And this reciprocity of obligation is not erased by a power of termination in one of the parties.[73]

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are not lacking in mutuality. "The mutual promises are held to create and fully support a valid and binding [requirements] contract." Brief of Appellant at 15, Fuchs v. United Motor Stage Co., 135 Ohio St. 509, 21 N.E.2d 669 (1939). Unfortunately the court was sidetracked by the defendant's contention "that Ohio cleaves to the adverse rule, 'there must exist mutuality in a contract both of obligation and of remedy, before such contract can be made the basis of a suit for specific performance', as is found adopted in Steinau v. Gas Co., 48 O.S. 524 . . . ." *Id.* To get around the "adverse" rule the court of appeals fastened on the purchase of $7,500 worth of defendant's stock by the plaintiff, labeling it "executed consideration for future business." *Id.* at 16.

The court of appeals was boxing shadows; the "adverse" rule did not exist since by the court's own admission mutuality is present in requirements contracts. Furthermore, the issue in *Steinau* was strictly mutuality of remedy—could the plaintiff obtain specific performance of a requirements contract by enforcing a negative covenant? A question answered in the negative because of the mutuality of remedy obstacle. *See* Austin, *supra* note 43, at 635-37.

72 1A CORBIN, *supra* note 2, § 152 at 4.

73 The mistaken notion that a right to cancel precludes mutuality also appeared in Raleigh v. Yanko, 62 Ohio L. Abs. 347, 106 N.E.2d 567 (C.P. 1952). The plaintiff union agreed to issue a union recognition card to the defendant restaurant who, in turn, agreed to employ only members of the union. The plaintiff had sole property rights to the card and could remove it at will. The court analyzed the agreement as follows:

> The union does not bind itself to do anything except that it acknowledges the issuance of the union card. There is a total lack of mutuality. If binding upon the employer, it is not binding at all upon the union. It is like a lease which would attempt to bind the landlord but allow the tenant to terminate the lease at will.

Id. at 353, 106 N.E.2d at 571.

There was, however, nothing illusory about the plaintiff's promise. The union exchanged possession of the recognition card for a commitment by the defendant to hire only union labor. If the union withdrew its card, the defendant's obligation to hire only union labor would end. Of this type of contract Corbin says:

> [T]he contract should not be regarded as unfair for its supposed lack of 'mutuality.' No court or writer has maintained that the validity of a contract depends upon an objective equality of advantages or values. Each promise made by one party does not have to be matched by an equivalent promise

The validity of the requirements contract is now, via adoption of the Uniform Commercial Code, codified in Ohio.[74] The possibility of attack on the grounds of indefiniteness is thus eliminated. In addition, if the comment supporting the original U.C.C. section is heeded, the mutuality problem disappears. The drafters of the Code expressly recognized that the obligations of both parties are reciprocal.[75]

VIII. CONCLUSION

The doctrine of mutuality of obligation is a viable concept in Ohio jurisprudence. In some instances it appears as harmless surplusage, almost as an afterthought. On other occasions mutuality has appeared in the form of an out of context tautology. "That both parties must be bound or neither is bound is true . . . ."[76] one court irrelevantly remarked where the issue was the validity of acceptance. In these situations it can be argued that invocation of mutuality is relatively harmless—if it can ever be said that shoddy reasoning can be harmless. But the line separating harmless surplusage from dangerous confusion is fragile. It is submitted that the line is crossed when mutuality is defined in terms of performance so as to explain and justify the existence of a unilateral contract, or when the "test" of mutuality is said to be the right of both parties to maintain an action for damages.[77] It is equally untenable to make mutuality a crucial factor in analysis of the option or to use it as apologia for ferreting out an implied promise from the circumstances of a transaction.

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made by the other. Each right or power or privilege possessed by one party does not have to have its exact counterpart in the other.

1A CORBIN § 161 at 68.

74 OHIO REV. CODE ANN. § 1302.19 (Page 1964). *See* Note, *Requirements Contracts Under the Uniform Commercial Code*, 102 U. PA. L. REV. 654 (1954).

75 Nor does such a contract lack mutuality of obligation since, under this section, the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure.

UNIFORM COMMERCIAL CODE § 2-306, comment 2.

76 Painter v. Brainard-Cedar Realty Co., 29 Ohio App. 123, 126, 163 N.E. 57, 58 (1928). A recent example of irrelevance is contained in Thomas G. Snavely Co. v. Brown Const. Co., 239 N.E.2d 759 (Ohio C.P. 1968). At issue was the existence of a creditor beneficiary contract. The court, with no explanation, invoked mutuality: "Writings purporting to be contracts which lack substantial mutuality in obligation are hardly contracts meriting great respect." *Id.* at 762.

77 Meier Grape Juice Co. v. Koehne, 3 Ohio L. Abs. 619 (Ct. App. 1925).

The diverse forms in which mutuality has been adapted and molded to fit a myriad of transactional situations by the courts in Ohio does not necessarily reflect the views of any single legal commentator. Some of the decisions interpret mutuality, as Williston did, as being synonymous with consideration.[78] On the other hand, mutuality has been viewed as something above and beyond the requirement of consideration.[79] The *Fuchs* decision apparently adopted Corbin's thinking that as long as consideration is present, mutuality is not needed.[80] Ohio courts have not, however, carried Corbin's recommendation to its conclusion and completely discarded the concept. And it is unlikely that they ever will.

The single factor that assures a position of endurance for mutuality in the judicial vernacular is the multi-dimensional characteristics that flow from the very word itself. What had originally served as a guardian of symmetry for the age of classical contracts gradually changed shape and assumed the proportions of a semantical catch-all whose purpose is to serve as a verbal device that allows the court to make sure that both parties receive that for which they bargained.[81] Whether it is a question of the exchange of reciprocal promises or performance as consideration, or whether the issue is "mutuality of assent,"[82] Ohio case law has imputed sufficient elasticity into the word mutuality to cover each situation.

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78 Stewart v. Herron, 77 Ohio St. 130, 82 N.E. 956 (1907); Fanning v. Insurance Co., 37 Ohio St. 339 (1881); Dayton, Watervliet Valley and Xenia Turnpike Co. v. Coy, 13 Ohio St. 84 (1861); Congregation v. Kesmo Del, 82 Ohio App. 282 (1948); Bowers v. Detroit Southern R.R. Co., 4 Ohio C.C.R. (n.s.) 479 (1904).

79 Mutual Home & Savings Ass'n v. Welker, 35 Ohio L. Abs. 566, 42 N.E.2d 167 (1941).

80 In the text of the opinion the Court said:

> The authorities are to the effect that so long as there is consideration for the obligation of the defendant, it is not essential that there be mutuality of obligation. . . .

Fuchs v. United Motor Stage Co., 135 Ohio St. 509, 515, 21 N.E.2d 669, 673 (1939).

This statement was diluted somewhat in the syllabus—which, in Ohio, contains the law of the case.

> So long as there is consideration for the obligation of one party to purchase merchandise from another, it is not *always* essential that there be mutuality of obligation . . . . (emphasis supplied)

Id. at 509, 21 N.E.2d at 669.

81 Professor Friedman analyzes the change in the role of mutuality in terms of "a maturing economic system" and as a "definite rejection of values inherent in classical contract law." L. FRIEDMAN, CONTRACT LAW IN AMERICA 89 (1965).

82 The Ohio Supreme Court once said:

"[T]here being express assent to the terms of the contract by both parties, the

In this sense it could be argued that mutuality of obligation has evolved into what Julius Stone calls a "category of indeterminate reference."[83] Mutuality now possesses many of the properties of a legal standard. As contrasted to rules, which are localized in content and effect (*e.g.*, "An offer which is too indefinite to create a contract if verbally accepted, may, by entire or partial performance on the part of the offeree, create a contract."[84]), legal standards, operating with the mobility of abstraction, necessarily cover a wide range of conflicts. Moreover, where a standard, *i.e.*, category of indeterminate reference, controls, "judgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case."[85] Viewed in this context, the doctrine of mutuality would allow "a wide range for variable judgment in interpretation and application, approaching compulsion only at the limits of the range."[86]

Mutuality as a legal standard raises two important questions. First, is it necessary to contract analysis? Would decision making be more difficult in its absence? The answer to both questions is no. The doctrine of consideration, itself arguably a form of indeterminate reference,[87] completely occupies the area in which mutuality normally makes its appearance. Hence to call upon mutuality can only result in diluting effective application of rules of consideration. Secondly, have courts been consistent in recognizing mutuality as a legal standard? Again the answer is no. If anything, the survey of decisions contained in this article demonstrates that Ohio courts consider mutuality to be both standard *and* precise legal formula.

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element of mutuality is not wanting." Railway Co. v. Cox, 55 Ohio St. 497, 516, 45 N.E. 641, 645 (1896).

83 J. STONE, LEGAL SYSTEM AND LAWYERS' REASONINGS *passim* (1964) [hereinafter cited at STONE].

84 RESTATEMENT OF CONTRACTS § 33 at 44 (1932).

85 STONE, *supra* note 83, at 263-64.

86 *Id.* at 264.

87 The elusive characteristics of the doctrine of consideration have been analyzed by Corbin in the following terms:

"The present writer believes that there never was any specific and definite 'origin' to be discovered, that no particular definition can (or ever could) be described as the only 'correct' one, and that there has never been a simple and uniform 'doctrine' by which enforceability can be deductively determined. Nevertheless, the use of the term cannot be avoided; but, in making use of it, it is necessary to consider the purpose for which it is used and to make sure that justice is not being defeated by using it in accordance with some narrow and limited definition." 1 CORBIN, *supra* note 2, § 109 at 487.